United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2340

ORIGINAL

To be argued by
JOHN VAN VOORHIS
or
SAMUEL N. GREENSPOON

United States Court of Appeals
FOR THE SECOND CIRCUIT

ALLEN & COMPANY,

Plaintiff-Appellant,

against

OCCIDENTAL PETROLEUM CORPORATION,

Defendant-Appellee.

REPLY BRIEF OF PLAINTIFF-APPELLANT

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I

Basic Misconception by Court and Defendant of Plaintiff's Theory of Action.

The outcome of this appeal, it is respectfully submitted, does not depend upon any findings of fact, most of which, although so labeled by the Court, are really conclusions of law,* but upon which of the widely divergent theories of the action this Court adopts. Defendant's brief, like the Court's opinion, ignores plaintiff's theory of action based on the undisputed facts, and instead of meeting it, treats it as though it did not exist. This is accounted by defendant's treatment of the case of *Mason* v. *Rose,* 176 F. 2d 486, 489 (2 Cir. 1949), upon which defendant chiefly relies (br. pp. 36, 43-4). *Mason* is really an important authority for plaintiff.

* This is a case involving the "legal characterizations" of the "transactions between the parties which is 'not a question of fact, but rather one of law' fully reviewable by us on appeal (*United Planters National Bank of Memphis* v. *United States,* 426 F. 2d 115, 117 (6th Cir.), cert. den. 400 U.S. 827 (1970))". *Handelman* v. *Comm. of Internal Revenue,* 509 F. 2d 1067, 1070 (2 Cir. 1975).

In *Mason* this Court made it clear that if either of the parties had appropriated the proposed subject matter to his own use, the venture was enforcible irrespective of any alleged missing terms or indefiniteness or vagueness. In distinguishing cases like *Mason* and others cited by defendant where the defendant *had not* appropriated the proposed subject matter from cases like the one at bar, where the defendant *has* appropriated it, this Court made clear that defenses such as those presently asserted by defendant are not available to it.

This Court said in *Mason* v. *Rose,* 176 F. 2d 486, 489:

> "Whether or not the aggrieved party had put in money, the other party had either got possession of the proposed subject matter, or had at least been able to exploit it for his own advantage. When the aggrieved party called him to account, he answered that there had never been any contract because all of the terms had not been agreed upon, and, since there was no valid contract, he owed nothing to the aggrieved party except to return the money, if any, advanced. In such situations the courts decide that this answer is not sufficient and hold that the party who took over or exploited the subject matter did so as a joint adventurer. In some of the cases there are statements that a joint venture differs from other contracts in that co-adventurers do not have to agree on all the terms of their undertaking. In our opinion the cases upon which the appellant relies are to be explained as instances of an imposed fiduciary duty rather than instances of making for the parties a contract which they never contemplated making and never made. In any event, all these decisions depend upon a benefit derived by the defendant out of the proposed subject matter of the common adventure."

This language admits plaintiff's case since the subject matter of the London discussions was appropriated by defendant and exploited for its benefit. This is why defend-

ant vehemently asserts, but without support in the record, that plaintiff's cause of action arises out of a letter contract dated December 17, 1964 (Exh. P-71, 1801a)* and not out of the earlier London conversations. The purpose of defendant's insistence upon this is quite evidently to attempt to escape from the undeniable fact that these parties started the joint venture at their London conferences on September 16-18, 1964. The December 17, 1964 letter (Exh. P-71, 1801a) evidences matters which were stated at the London conference, and proves beyond contradiction the reality of the joint venture with respect to obtaining and exploiting the concessions. But it did not originate the venture, as defendant's counsel artificially contends.

This point is so important to defendant that its brief makes several basic misstatements of the record regarding it. Thus defendant says (br. p. 38):

> "Plaintiff's counsel, contrary to its present argument, conceded that the earlier dealings between the parties did not give rise to any binding obligation (331a)."

An examination of the record (331a) shows that this clever and misleading statement in defendant's brief refers to plaintiff's counsel's answer as follows:

> "The Court: Of course, up to this point, according to these letters, even on your theory of being both an oral and written contract, there is no agreement yet"

to which Mr. Greenspoon, of counsel to plaintiff replied, "Not yet."

The letters referred to were Exhibits P-31, P-32 and P-33 (330a-331a) which are printed in the appendix (1768a-1772a) and are dated respectively September 5, September 7, and September 8, 1964. This was more than a week *before* the London conversations between Dr. Hammer and

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* Figures in parentheses (a) refer to pages in printed appendix; figures in parentheses (Trans.) refer to pages of stenographic transcript.

Herbert Allen in which the joint venture was formed (332a-336a, 451a-452a).

The pre-trial order states, contrary to defendant's assertion (br. p. 38), that "Plaintiff contends that in or about *September to December 1964* it entered into a joint venture with the defendant for the purpose of obtaining and exploiting oil and gas concessions in the Kingdom of Libya . . ." (43a). (Emphasis supplied.) This is the same position taken by plaintiff throughout the trial (107a; Trans. pp. 4, 6-7, 2618-2619). Any inference sought to be conveyed to this Court that plaintiff's counsel at any time disclaimed the existence of the joint venture until Dr. Hammer's letter of December 17, 1964, is completely wrong.

Again, defendant says (br. p. 38) that: "Plaintiff offers the novel contention that the initial discussions of the parties *though resulting in no contract* give rise to a fiduciary duty requiring the defendant to continue the negotiations and to conclude a valid joint venture agreement with the plaintiff" (pp. 15, 32-36). (Emphasis supplied.) This is an unjustifiable distortion of plaintiff's position.

The facts regarding the formation of the venture are set forth incontestably in our main brief (pp. 7-12), and the position there taken (main br. pp. 31-45) is no afterthought and, we submit, is mandated by the undisputed evidence. Plaintiff does not assert that a contract was not made between these parties in September, but asserts the opposite. The inevitable conclusion from the London conversations and the subsequent conduct of the parties was that they, in September 1964, set out upon a joint venture to obtain these Libyan concessions and to exploit them if they were obtained.

Any condition with respect to Galic turning up the concessions (p. 54 of pl's main br.) did not alter the facts that from the outset in September 1964 the parties were bound by ties of mutual loyalty to aid and assist each other in procuring the concessions, defendant was bound to aid Galic and not to frustrate his efforts to turn up the concessions,

and neither party could legally compete with the other for the concessions or obtain and appropriate them to its own use without opportunity to the other to participate.

Even if it were to be held to have been part of the original agreement that Galic had to turn up the concessions, a joint venture relationship was formed to obtain the concessions and defendant was in no position to appropriate the subject matter to its own use before Galic or his group had full opportunity to perform what was expected of them. Defendant could not unilaterally determine that Galic or his group would not be able to perform and unilaterally cancel out plaintiff and Galic; and having done so, defendant cannot be heard to assert that Galic did not perform. That would be true even without a fiduciary relationship because defendant could not take advantage of the non-performance of a condition which it had hindered or prevented. Neither is there any inconsistency in plaintiff's alternate contention that Galic or his group performed despite the obstacles put in the way by defendant.

The fact that the law imposed fiduciary duties from the start of the relationship between these parties, which was completely overlooked by the Court and ignored by defendant, not only renders defendant liable for appropriating the enterprise before the time for performance of the condition arrived, but it also nullifies the defense that plaintiff consented to termination of the joint venture.

Even if Hammer's false testimony were accepted that in August 1965 Herbert Allen told him over the telephone that it was all right for defendant to have acted as it did regarding the deRovin report (639a), this could not be regarded as a valid consent to termination of the venture. The parties stood in a fiduciary relationship; and on the undisputed evidence there was no informed consent in view of the concealment and misrepresentation by defendant of material facts in its possession which would weigh heavily with any decision which might be made by plaintiff with respect to continuation in the enterprise (see pl's main br. pp. 57-62, 26-31).

II

As Matter of Law Defendant Had No Basis On Which To Terminate The Joint Venture For Cause; In Any Event Defendant Is Precluded From Using The deRovin Report As A Basis For Termination On Account Of Its Delay In Notifying Plaintiff Until After It Was Too Late For Plaintiff To Seek These Concessions For Its Own Account Or In Alignment With Others.

Defendant says (br. p. 59) that defendant's alleged termination of the venture "was based upon the criminal record of deRovin and upon Dr. Hammer's cancellation of the three agreements it had made with Galic, deRovin and Ogbi* in London in September 1964 (1843a-1845a; 1841a), *upon which plaintiff's own arrangement was dependent.*" (Emphasis supplied).

Plaintiff's right to participate in the venture was not dependent upon the three agreements which defendant as managing venturer had made with Galic, deRovin and Ogbi in London in September 1964. Defendant's statement quoted above implies that since it made these agreements on its own, it had the unilateral right to cancel out plaintiff as a participant in the venture by cancelling these other agreements. Plaintiff's rights were not dependent upon these agreements but upon its own agreement with defendant on which this action is based.

Defendant could not utilize the deRovin report to exclude plaintiff and appropriate the venture by deciding unilaterally in advance that on account of deRovin it would be impossible for Galic or Ogbi to turn up the concessions (see pl's main br. pp. 13-20, 57). Defendant could not do this even if deRovin were *persona non grata* in Libya (which

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* Defendant had not cancelled with Ogbi (See pl's main br. ftn. pp. 17, 26, and ftn. pp. 23-24 *infra*).

was untrue, see main brief p. 19). If that had been true, or if it seemed advisable that deRovin discontinue his participation all that was necessary was for him to stand aside, as was done by the plaintiff in *Dean Vincent, Inc.* v. *Russell's Realty, Inc.*, 521 P. 2d 334 (Ore. 1974).

The attempted distinction of that case (deft's br. p. 60) is baseless. In *Dean Vincent* the plaintiff had introduced a prospective purchaser to the seller, and sued the other broker, as a joint venturer, to recover half of the commissions on a real estate deal. As it turned out, the prospective purchaser became hostile toward the plaintiff, who thereafter stood aside and took no part in the extended negotiations that were conducted by the defendant which resulted in the sale. Nevertheless it was held that plaintiff was entitled to half the commission on his joint venture contract with the other broker who continued to pursue the subject matter of the venture.

In the action at bar, defendant elected to continue with the joint venture from September 1964 until defendant breached the venture by its letter of July 16, 1965 (1843a). This so-called "termination" or "abandonment" letter (Exh. P-124, 1843a) was sent so as to be received by plaintiff less than ten days before the last day fixed by the Libyan government for filing applications for concessions.

This letter convincingly demonstrates that defendant recognized that plaintiff had rights in the joint venture. It tells plaintiff that on receipt of the letter (1843a) it is "free to make any other arrangements you wish". That means that between the dates of "our agreement" (Exh. P-124, 1843a) and the receipt of defendant's letter dated July 16, 1964, both defendant and plaintiff knew that plaintiff was *not free* to make other arrangements to obtain Libyan concessions. This letter (Exh. P-124, 1843a) belies defendant's contention that the joint venture contract was a nullity and bound no one to anything.

Moreover, by delaying action on the deRovin report for four months and lying in wait in order to make sure

that plaintiff would not be able to ally itself with others, or even to act by itself, defendant is precluded from contending that it cancelled the venture for cause. It was totally impossible, as defendant well knew, for plaintiff to make any other connection (or to act by itself) in the short interval of time remaining after plaintiff received the July 16, 1965 letter.* The real reason for the cancellation has been shown to have been the rapidly brightening prospects of exploiting these areas in Libya.

Hammer testified in his deposition that "We terminated with Allen" (498a) by sending this letter dated July 16, 1965 after obtaining a letter dated July 15, 1965 from Chase Manhattan Bank. This was Hammer's purported excuse for not utilizing the plaintiff's name in the application for the Libyan oil concessions (*id.*). Hammer testified (498a):

> "We did that—one of the reasons—to make sure that we would not have—there would be no question of our being able to stand on our own legs as far as our financial ability was concerned."

Thus the obvious inference is that the July 16, 1965 letter was sent only when defendant felt it no longer needed plaintiff financially and could afford to discontinue using its name.

Incidentally, the letter from the Chase Manhattan Bank did not say that Chase would back defendant; it stated that defendant's net worth was $47,000,000 and that it had $14,000,000 in working capital (1842a). Even that small amount had to support its fertilizer and chemical business as well as its oil operations which were minor at that time. This effectively disposes of the rhetoric throughout defendant's brief, which made such an impression on the Court, that by entering into this joint venture plaintiff would be liable to face astronomical expenditures running

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* Some indication of the work involved and in the time required is shown by the fact that although defendant had been working for months on the application it barely made the July 29, 1965 deadline (558a).

into hundreds of millions of dollars. By reason of the 75% to 25% ratio of contribution provided for in the agreement, defendant would have had to invest $3.00 for every $1.00 put up by plaintiff, which could hardly run into astronomical figures in view of the small size of defendant's resources at that time.

The language of the July 16, 1965 "termination" letter (1843a) is evasive and contains material omissions and misstatements. Defendant has never explained how a report that one person having a role in the project was untrustworthy could absolve defendant from its fiduciary and contractual obligations to responsible parties such as plaintiff. Defendant has not offered a scintilla of evidence that deRovin injured or could have injured the enterprise nor even that he was not *persona grata* in Libya (945a-946a). The discovery that deRovin had an unsavory record could not operate to justify the defendant freezing out its co-venturer, at a time when Hammer considered that the prospects were so bright, that, as he put it, defendant could stand on its own legs financially and no longer needed plaintiff (498a).

Neither Herbert Allen's dutiful sending of the deRovin report to his co-venturer (99a; 578a; 1011a) nor the matters contained in the deRovin report constituted a breach of the joint venture agreement on plaintiff's part. *Walker* v. *Leeming,* 174 App.Div. 395 (1st Dept. 1916).

Evidently, realizing that the alibi set forth in its July 16, 1965 letter, to wit, deRovin's record, did not justify abandoning the plaintiff at the eleventh hour, defendant claimed that it was justified in abandoning its co-venturer on account of (i) purported assignments by deDovin, Ogbi and Frottier of part of their compensation under the contracts made with them by defendant, and (ii) Galic's alleged assistance to a German company which was awarded an area sought by defendant (Deft's Post-Trial Brief in the District Court, pp. 53-4).

There was nothing in the agreements with Ogbi, deRovin or Frottier (Exhs. P-37, P-38, P-63, P-64, 1774a-1775a,

1791a, 1793a), which prevented them from assigning all or any part of their compensation. Moreover, there is no proof that plaintiff had any knowledge of such assignments or even of the terms and conditions of the contracts with these men (460a; 723a). Nor is there proof that plaintiff had any prior knowledge of deRovin's record. In Hammer's words, plaintiff—as soon as it received knowledge thereof and in accordance with "its duty" as a joint venturer—forwarded the deRovin report to defendant (1011a; cf. 99a; 578a).

The Court in making its decision was influenced by Galic's alleged assistance to a competing German company, but the Court afterwards concluded that there was no evidence that Galic had assisted this German company and deleted that statement from its opinion (105a-106a).

Accordingly, as matter of law, there was no basis for terminating the joint venture (*Friedman* v. *Golden Arrow Films, Inc.*, 442 F. 2d 1099 (2 Cir. 1971).

Realizing that its delay in notifying plaintiff of its attempted cancellation of the joint venture by its letter of July 16, 1965 might nullify the attempted cancellation, defendant sought to justify its four months' delay after receiving the deRovin report by asserting that it was afraid of retaliation by Galic in Libya. According to Dr. Hammer's contrived version, he was relieved from this fear by the Chase Manhattan Bank's letter to Fuad Kabazi, Libyan Minister of Petroleum, dated July 15, 1965 (Ex. P-124, 1843a), on which so much emphasis has been placed, and which has been described above and more particularly in plaintiff's main brief (pp. 19-20).

There is nothing in this letter which could possibly have relieved Dr. Hammer from any fears upon this score which he says that he entertained. He testified that "We did terminate in July" and added "By that time we felt that we were not afraid that he would be able to block us in getting concessions" (585a). His deposition continues at that point:

"Q. I take it that you had such a fear in March 1965

[when he received the deRovin report], is that correct? A. Yes.

"Q. And you had such a fear in April 1965? A. Yes.

"Q. And in May 1965? A. Yes.

"Q. Right? A. Yes.

"Q. And in June at the time you terminated with Mr. Ogbi you still had such a fear?* A. That's correct.

"Q. What happened between June 10, 1965 and July 16, 1965 that overcame your fear? A. Well, one event was getting a letter from the Chase Bank on July 15 which put us in a strong financial position, *so that Mr. Galic could not represent that we were not financially strong enough to carry out our obligations*" (585a) (emphasis supplied).

Hammer's real fear was, as he inadvertently admitted (498a, 585a), that the Libyan government would question that defendant had sufficient resources so that, without participation by plaintiff, defendant would be "able to stand on our own legs as far as our financial ability was concerned" (498a). This shows that Hammer's *real* concern in discharging Galic was that he was afraid that Galic might bring home to the Minister of Petroleum that without participation by plaintiff, defendant would not be able to stand financially on its own legs.

By the time Hammer received from plaintiff the deRovin report he had decided, based mainly on the favorable Vaughan reports which had been concealed from plaintiff, that there was no likelihood that the costs of the Libyan oil venture would be astronomical or even beyond defendant's limited capacity to finance without plaintiff, and so he had taken the calculated risk that defendant could succeed (which it did) in shouldering the entire cost and reaping the whole profit from the venture. The secret Vaughan report made clear that drilling and exploration costs were

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* Defendant did not terminate with Ogbi in June 1965. (See pl's main br. ftn. pp. 17, 26, and ftn. pp. 23-24, *infra*).

moderate in all events (1985a, 1987a). Thus the real reason why plaintiff was frozen out was that defendant knew that the risks were minimal and the costs relatively insubstantial; the other reasons were obviously invented as afterthoughts in an attempt to justify this self-serving conduct.

III

Having Placed Itself In This Untenable Position By Attempting To Cancel The Joint Venture Unilaterally Without Sufficient Cause, Defendant May Not Complain That Plaintiff Took No Action To Enforce Its Claim Until After The Discovery of Oil.

It is an ancient legal maxim, well grounded in experience, that a party cannot take advantage of its own wrong. This is particularly true where, as here, the parties stand in a fiduciary relationship, and especially where the defaulting fiduciary is the managing partner of a joint venture, since its responsibility to the other joint venturer is particularly sensitive and acute (*Meinhard* v. *Salmon,* 249 N.Y. 458, 468, Cardozo, Ch. J. (1928); *Libby* v. *L. J. Corp.,* 247 Fed. 2d 78-82 (D.C. Cir. 1957) (Burger, J. now Ch. J.); *Byrne* v. *Barrett,* 268 N.Y. 199, 207 (1935).

Dr. Hammer insisted upon the management of the enterprise by defendant, and took charge from the beginning. This was suitable and was anticipated, since defendant's know-how was superior to plaintiff's in this field. But with the management went responsibilities, and the powers of management could not be abused to the manager's personal advantage and to the detriment of the co-venturer. It was defendant's duty to consult with plaintiff in matters relating to the costs of the enterprise. It was not plaintiff's obligation (as the Court seems to have thought) to pursue the defendant and penetrate the curtain of secrecy which defendant maintained between them in order to ascertain and take the initiative in contributing toward

the various costs which were being incurred or paid without disclosure to plaintiff.

The law is well established that a party in the position of a *cestui que trust* is under no obligation to steer or set right a faithless fiduciary, even to the extent that negligence on the part of the beneficiary in following up the fiduciary to ascertain whether or where he has defaulted is no defense. *Matter of Ryan,* 291 N.Y. 376, 417 (1943); *Adair* v. *Brimmer,* 74 N.Y. 539 (1878); *Werking* v. *Amity Estates,* 2 N.Y. 2d 43 (1956); *Matter of Mendleson,* 46 Misc. 2d 960, 977 (Surr. Albany 1965). In *White* v. *Sherman,* 168 Ill. 589 (1897), it was held by the Supreme Court of Illinois that a beneficiary is under no duty to act as adviser to his trustee, and that the trustee should not be allowed to escape liability by notifying the beneficiary concerning the trustee's own improper acts, omission or transaction.

The Court put the cart before the horse in holding that a duty rested upon plaintiff to keep track of what the defendant was doing in violating its obligations as a fiduciary and promoting the enterprise for itself alone. This error arose from the Court's refusal to recognize, as it should have done as matter of law, that a fiduciary relationship existed between these parties from the beginning of their joint enterprise. The Court even ignored the relationship of trust and confidence, when it assumed *arguendo* the existence of a joint venture relationship, in determining whether there was acquiescence in the purported cancellation (85a).

Defendant and the Court stress the circumstance that plaintiff took no active steps to enforce its rights in this joint venture until after oil was discovered in these concession areas. This discovery was not remarkable, in view of defendant's secret knowledge that oil had previously been discovered in the concession areas obtained by defendant in the Sirte Basin by major concessionaires which had previously held and then surrendered portions of their concessions under their contractual arrangements with Libya (1974a-1977a, 1988a, 1990a).

And assuming for argument that plaintiff did not consider that it was worthwhile to make a claim until after it had learned that oil could be profitably extracted from these areas, what would have been so wrong in plaintiff's waiting to pursue its claim until it was known whether it was worthwhile to do so? If defendant chose to play fast and loose with plaintiff's rights as a co-adventurer, and elected in its own interest to conceal from plaintiff the complex and favorable facts concerning this enterprise which the many cases cited in Point IV and elsewhere in plaintiff's main brief (esp. 55-64) hold that defendant had to disclose to enable plaintiff to make an informed decision, defendant has nobody but itself to blame. The "heads I win tails you lose" argument which defendant makes with so much sound and fury, and which seems to have impressed the Court, has no application to such a situation.

Certainly, defendant cannot claim prejudice. As Hammer admitted (Trans. p. 1174):

> "Q. Mr. Hammer, are you telling us that you would not have sought the concessions if Galic—if Allen & Company had rejected your letter of July 16, 1965? A. That isn't what I said."

Defendant went ahead with the exploitation of the venture in its own way, unaffected and undeterred by anything that plaintiff did or omitted, and is in no position to claim that it was misled or suffered loss through anything attributable to plaintiff. Nor did the rights of any third party intervene.

Defendant cites (br. pp. 63-64) *Rothschild v. Title Guarantee & Trust Co.*, 204 N.Y. 458, 461 (1912), which was relied upon and followed by this Court in *Scientific Holding Co. Ltd.* v. *Plessey, Inc.*, 510 F. 2d 15, 25 (2 Cir. 1974), in support of the proposition that "Where a person wronged is silent under a duty to speak, or by an act or declaration recognizes the wrong as an existing and valid transaction, and in some degree, at least, gives it effect so as to benefit

himself or so as to effect the rights of relations created by it between the wrongdoer and a third person, he acquiesces in and assents to it and is equitably estopped from impeaching."

This quotation is taken verbatim from the opinion by Judge Collin in the *Rothschild* case, and is manifestly qualified and limited by the statement made in the same opinion (p. 464 of 204 N.Y.):

> "*When a party with full knowledge, or with sufficient notice of his rights and of all the material facts,* freely does what amounts to a recognition or adoption of a contract or transaction as existing, or acts in a manner inconsistent with its repudiation, and so as to affect or interfere with the relations and situation of the parties, he acquiesces in and assents to it and is equitably estopped from impeaching it, although it was originally void or voidable." (Emphasis supplied).

Defendant cannot foist this concept out of context on plaintiff, from whom defendant had deliberately concealed all the material facts regarding the venture which would normally be considered in making a business decision as to whether or not to proceed with it. Nothing in *Rothschild* or *Scientific Holding Company, Ltd.* supports defendant's argument.

Other cases cited by defendant such as *Patterson* v. *Hewitt,* 195 U.S. 309 (1904) and *Pfister* v. *Cow Gulch,* 189 F. 2d 311 (10 Cir. 1951), were also decided on the same basis as the *Rothschild* case, to wit, the plaintiff had full knowledge of all material facts and there was no showing of a failure to disclose material facts.

The defendant also relies on the lower Court decision in *Westwood* v. *Cole,* 66 Misc. 53 (Sup. Chaut. 1910) rev. 139 A.D. 841 (4th Dept. 1910). The reversal expressly stands for the rule that the heads I win, tails you lose defense could not possibly be applicable in this case. In *Westwood* plaintiff flatly refused to put in any money *although requested repeatedly to do so.* Nonetheless, the Appellate

Division held that the defendant could not squeeze out the plaintiff from the venture.

Defendant, in a vain effort to support the purported finding that the plaintiff acquiesced in defendant's alleged termination distorts the record and confuses plaintiff with Allen & Co. Inc., which is a corporation of similar name but is an entirely separate entity.

Defendant argues (br. p. 62) that the burden of proof is upon plaintiff to establish that the alleged disclaimer made on its behalf in the questionnaire signed by the Corporation was not binding upon it. This is of course the opposite of the rule. The Court ruled (77a) that the burden of proof is *on the defendant* on the issue of consent or ratification. The only bearing which either the underwriter's questionnaire or the prospectus issued by defendant could have on this issue would be as an admission against interest. The only way in which it could possibly be an admission against interest by plaintiff would be by bringing home to Charles Allen or Herbert Allen, who were the sole managing and general partners of plaintiff, knowledge of the contents of the questionnaire or prospectus before they were issued. The burden of proof was held to be on the defendant to do this.

Made aware by plaintiff's brief in the Court that the mere fact of Charles and Herbert Allen being members of the board of the Corporation is not sufficient to charge the plaintiff with knowledge of the contents of either the questionnaire or the prospectus, defendant's counsel has engaged in a new form of sophistry by charging that what was done by the Corporation was *ipso facto* done by the plaintiff, and that therefore the plaintiff is chargeable with knowledge of what was done by the Corporation. Thus, defendant says (br. p. 61) that plaintiff never advised any of *its* customers who had purchased defendant's debentures that *it* claimed an interest in the concessions "although it was conceded that plaintiff was under a duty to disclose any such interest to *its* customers."

Plaintiff partnership, owned and operating separately from the Corporation, sold none of defendant's debentures and had no customers therefor. Plaintiff never conceded that it was under a duty to disclose such interest to any purchaser of defendant's bonds or to anyone (381a).

Both Charles Allen and Herbert Allen denied having any knowledge of either the prospectus or the questionnaire (304a, 305a, 427a), and there is no evidence that they possessed such knowledge. The debenture issue was underwritten by Lehman Brothers (the lead underwriter), Reynolds & Co. and Allen & Co., Inc. (2042a). Neither Allen & Co. Inc. nor plaintiff's lawyer had anything to do with the prospectus (Exh. D-11, 2042a *et seq.*) and the underwriter's questionnaire was handled for the corporation routinely by its office manager (2038a-9).

Defendant is thus relegated to the incredible argument (br. p. 63) that the denial by both Allen brothers that they had such knowledge proves that they did have it without any evidence to that effect. Of course, disbelief of testimony cannot alone be the basis of a finding that the contrary is true. *People* v. *Rides,* 273 N.Y. 214, 217 (1937); *People* v. *Van Zile,* 143 N.Y. 368, 372 (1894); *Wallace* v. *Berdell,* 97 N.Y. 13, 21 (1884).

The heavy reliance placed by the Court on this questionnaire and the prospectus in finding that plaintiff consented to termination of the venture should, in itself, result in a reversal of that finding.

Defendant says (br. p. 61) that defendant's prospectus for the June 17, 1966 debenture issue made no mention of plaintiff's interest in the Libyan concession, although the defendant's prospectus indicated that a portion of the proceeds of the public issue would be used by defendant for oil and gas development in Libya. There is mention of Libyan concessions but not a word in the prospectus that any part of the proceeds would be used for oil and gas development in Libya (2043a).

IV

The Libyan Law and Regulations Providing For the Submission of Bids For Concessions Do Not Preclude, But, On The Contrary, Require The Ministry Of Petroleum To Make Inquiry Where It Is Deemed To Be Appropriate After Bids Have Been Submitted; Nor Were The Bidders Forbidden To Promote Their Applications (Exhibit D-27, 2120a).

Although the applicants were not allowed to amend their applications after submitting them, the government's consideration of the applications was expressly not confined to material submitted with them but

> "The applicant shall, at the request of the Ministry of Petroleum Affairs, furnish any further relevant information which may be required by the Ministry and which relates to his application." (Exh. D-26, 2097a)

Moreover, as was the case with respect to numerous applications made for the concession areas in suit, it is provided by the Libyan law that (2097a-8):

> "In the event of more than one application being submitted for a concession over the same area the Ministry of Petroleum Affairs shall have absolute discretion as to which application to accept."

As Hammer admitted, there was no competitive bidding in that there were no high or low bidders, as in the sale at public auction of government or municipal bonds, or in the awarding of public contracts where each bidder is bound by the plans and specifications for the project (1849a; trans pp. 827, 948; 1849a). The discretion in the ministry in awarding concessions was virtually unlimited. Nothing in the Libyan law or regulations purports to prevent the various oil companies from talking to the ministers or

other Libyan public officials in an endeavor to persuade them that the bids of their companies should be accepted.

The contention to the contrary made by counsel for defendant on this is frivolous. Dr. Hammer was told in London in Septembr 1964, when this joint venture was formed, that the former method of awarding oil concessions by negotiation without any form of bidding had been changed and that the King had the last word (551a).

This case thus differs completely from *Hillyer* v. *Pan American Petroleum Corporation,* 225 F. Supp. 425 (ND. Okla. 1963), aff'd. 348 F. 2d 613 (10 Cir. 1965), which was an action for commissions, in that there the commissions were payable only if the Iranian government adopted private negotiations as the only method of awarding a concession, without the submission of bids in any form.

At bar Hammer, when he entered into the joint venture agreement, knew that bids for the concessions would have to be filed. Hammer testified (551a):

> "Q. Now, at this meeting, or series of meetings, was there anything said to the effect that the only way that you can get concessions in Libya was through submitting a competitive bid? A. Yes, we were told that the procedure was going to be to file sealed bids * * *"

He was also told in London in September 1964 that discretion would play a dispositive role in the award making procedures (551a).

Hammer further expected that Galic would visit with the Minister of Petroleum to persuade him to favor the venture. Thus, he testified:

> "One of the things that most concessionaires did was to go around and meet the the various ministers and get acquainted with them so that it would help for character purposes." (612a)

The application itself offered to supplement the material contained therein by conversations with technical and man-

agement personnel. (Letter 29 July, 1965, Exh. P-130, 1849a.)

In his opening statement to the Court at the beginning of the trial, defendant's counsel said that the activities expected of Galic by defendant included "the legal processes by which representatives create good will", and that he was supposed to "visit all the ministers to describe the responsibility of an independent company who is not known as Standard Oil was * * *" (125a).

If the Libyan law precluded this, as the same counsel now contends in the brief for the defendant, Dr. Hammer would not have made the contracts which he did on behalf of defendant on September 18, 1964 in London calling upon Galic, deRovin and Ogbi to do these things (Exhs. P-36, P. 37, P-38, 1773a-1775a) *nor have employed others to take their places* (125a; Trans. pp. 1163, 1165).

The uncancelled letter agreement with Ogbi, dated February 15, 1965 (1810a) makes it clear that activities beyond the formal application were to be utilized and were considered by defendant to be necessary in order to obtain these concessions. This letter agreement, signed by Richard H. Vaughan on behalf of defendant, unqualifiedly states to Ogbi (1810a):

> "*We wish to confirm that we propose to work exclusively through you and your channels in this endeavor.* As a result we naturally expect an exclusive effort for our account on your part and your agreement that you will represent our interests to the exclusion of those of any other group. *We further expect through your efforts to obtain the maximum possible number of selections that we shall so finally designate, but not less than three.* It is understood that our reciprocal exclusiveness also covers any endeavor related to the fertilizer industry." (Emphasis supplied)

If anything further were needed to demonstrate the baselessness of this myth now being fostered, and to which ap-

parently the Court subscribed, that nothing could legally be done in Libya to promote the awarding of these concessions outside of the written application, it is supplied by the fact that after Galic was purportedly discharged on June 16, 1965, the defendant replaced him and his group with four other men named Hans Kunz, Kamal Zade, Wendell Phillips and Fabrizio Mori. They reported directly to Hammer and were paid by defendant (Trans. pp. 1163-5).

Defendant's counsel said in his opening statement that these men were employed to do what Galic and his group were supposed to do (125a). They worked through February 1966 until the awarding of the concessions was publicly announced (Trans. p. 1165). When Hammer was pressed at his examination before trial to tell what these men did or were supposed to do, vigorous objection was made which was erroneously sustained by a different Judge who ruled on the objections. It is time that an end was put to the constant repetition that the concessions were awarded in the name of defendant "on the merits", unless that expression includes references to the bidders' merits and connections as extolled by their representatives in discussion with the ministers and other public officials.

V

The Defendant Misstates The Record In Its Brief.

Defendant's statement of alleged facts distorts the record, is in conflict with the record, and is erroneous in material respects. We can only set forth some of the material misstatements.

a) Defendant says (br. p. 4) that unbeknownst to it, Frottier had agreed to share his compensation derived from defendant with the plaintiff (the Allens) deRovin, Galic and others. In regard to this, see pp. 9-10, *supra*. Plaintiff knew absolutely nothing about any such alleged arrangement and had no part in it (1232a).

b) Defendant claims (br. p. 5) that Herbert Allen demanded from Dr. Hammer the right of "prior approval" of costs before plaintiff would be bound (341a). Nothing was

said in any conversation about whether the costs or anticipated costs had to be submitted or approved in advance, and Dr. Hammer never testified that there was any discussion to that effect (537a-576a).

c) Defendant states (br. p. 6) that Hammer's letter of December 17, 1964, as amended (Exh. P-71, 1801a) contains the entire understanding between the parties. This is only true to the extent stated in plaintiff's main brief (pp. 9-10). The letter does not mention that defendant was to be the managing venturer, which is evidenced by the fact that Hammer at once took charge, and does not identify the Libyan concessions to be obtained by the venture (which Dr. Hammer conceded were the concessions mentioned in the arrangement which he had made with Ogbi and were to be contained in bidding blocks 32 and 59) (573a-574a; Exh. P-38, 1775a).

d) Defendant's statement (br. p. 7) that it was understood that plaintiff's involvement in any Libyan undertaking would be dependent upon the mutual consent of the parties is not borne out by its references in its brief (1768a; 1770a-1771a). This is simply defendant's erroneous construction of the mutual agreement on costs provision, which is a characteristic of joint ventures. Moreover, defendant's statement is contradicted by Dr. Hammer's so-called cancellation letter dated July 16, 1965 (Exh. P-124, 1843a), which expressly recognized that commitments between the parties were already in existence.

e) Dr. Hammer says (br. p. 7) that it was his interpretation of the London meetings that Herbert Allen did not intend to be bound to any expenditure without a further opportunity of review. Defendant cites the record at pp. 537a-538a. This citation is to Dr. Hammer's conclusion or interpretation of what was said, not his recital of what the parties had agreed to, as was recognized by the Court at the time (538a). When defendant insisted that this deposition testimony be read into the record over plaintiff's objection, the Court concurred but added (538a):—

> ". . . I think there may be some substance to your position that he is expressing an opinion."

The Court, as stated by defendant, did accept this opinion and relied upon it (82a) which highlights the Court's error in construing the agreement between the parties. Even if correct this would not defeat the existence of a joint venture.

f) Defendant says (br. p. 9) that on June 19, 1965,* Ogbi agreed to limit his services to some ministerial activities. That is squarely contrary to the written record. On that date, June 19, 1965 (Exh. P-122, 1841a) Ogbi agreed to the cancellation of his September 18, 1964 agreement leaving in effect his agreements dated February 15, 1965 (Exh. P-80, 1810a) and February 18, 1965 (Exh. P-213, 2011a). Ogbi's agreement dated February 15, 1965 (1810a) expressly provided:

> "We [defendant] wish to confirm that we propose to work exclusively through you and your channels in this endeavor [the concessions]"

g) Plaintiff says that the Minister of Petroleum considered the defendant to be a very important company in the petroleum, gas, chemical and fertilizer industry (br. p. 13) but Kabazi testified at the very page cited by defendant (1005a), that he had not discovered that the defendant was in the oil business.

h) Defendant says (br. p. 13) that the Chase Bank letter was carefully considered by the Libyan officials in determining defendant's eligibility for concessions. Kabazi testified to the contrary at the very page cited by the defendant (970a). Kabazi testified that he did not pay much attention to this letter and that it was not a financial com-

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* It was not until July 26, 1965 (1846a-7a) that Ogbi's services were limited; prior thereto and when the "termination" letter of July 16, 1974 was sent to plaintiff, under Ogbi's February 15, 1965 agreement (1810a) defendant still agreed that defendant would work exclusively through Ogbi and his channels in this endeavor and under the agreement of February 18, 1965 (2011a-3a) Ogbi was expressly bound by defendant to the best of his ability to pursue the objective of obtaining oil and gas concessions of defendant's selection.

mitment (970a-971a). Defendant cannot utilize Kabazi's testimony by claiming that he testified to the reverse of what he said upon the same subject.

i) Defendant says (br. p. 14) that one of its unique and original special preferences was a firm $30,000,000 obligation to build an ammonia plant in Libya regardless of whether or not oil was discovered by defendant. Indeed, the Court in reaching its conclusion that the defendant obtained the consessions without Galic's aid stressed the alledged fact that the defendant was obligated to develop a $30,000,000 ammonia plant even if no oil were found (97a-98a).

In actuality, the investment in the ammonia plant was to be "up to $30,000,000 U.S.", which investment was to be "shared 50/50 between Occidental and the Government of Libya" (1853a). The application further provided (1853a):

> "The investment may consist entirely of equity or of equity and loan funds depending upon the results of a feasibility study to be initiated within sixty (60) days from the granting to Occidental the petroleum concessions of our choice. Such feasibility study shall be conducted at the sole expense of Occidental. *If the project shall be deemed feasible by both parties it is binding on each subject to the appropriate guarantees of the United States Government.*" (Emphasis supplied)

Incidentally, there is no evidence that the ammonia plant was ever built or that anything ever came of the oxytrol process to which defendant alludes (br. p. 14).

j) Defendant says (br. p. 16) that the Libyan working committee, which did not even have power of recommendation, was unanimous in accepting without question the "commitment" letter of Signal Oil as a viable distributor (br. p. 16). The very testimony which defendant cites negates this statement. All that the committee was unanimous about was that Signal Oil was able to absorb an unspecified amount of oil if oil were found (967a). None

of the committee or anyone else, considered the letter as a "commitment", and on its face it is not a "commitment" at all (812a, 972a, 1891a). In Kabazi's language it "was quite a vague thing (912a).

Signal Oil had only a refining capacity of 126,000 barrels per day (965a). Kabazi testified that "later we found everybody saying that he had agreements with Signal to sell oil" (812a).

Hammer admitted that this non-committal letter from Signal was the only understanding that defendant had with Signal at any time prior to the filing of the application with the Libyan government (825a).

k) Defendant makes a series of misstatements (br. pp. 17-18), to the effect that it was criminal for Kabazi to leak information;* that plaintiff's name was not mentioned before the High Council or the Council of Ministers; that the High Council's recommendations to the Council of Ministers contained no dissent by Kabazi; that the Council of Ministers adopted these recommendations which were afterwards approved by the King; and finally (br. p. 25) that Kabazi testified that plaintiff's name was never mentioned to any governmental official (i.e., to any Minister) who voted to grant the oil concessions.

Since this series of misstatements purports to and necessarily must rest upon Kabazi's deposition testimony, we turn to his deposition testimony to test defendant's misstatements.

Kabazi testified that the deliberations could be disclosed if his office authorized it (980a), and that these deliberations were the subject of leaks all over Tripoli (963a), and furthermore plaintiff was mentioned and discussed by the High Council which contained five of the members of the Council of Ministers who ultimately voted to grant the concessions (900a, 905a, 909a-910a, 977a).

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* If leaking invalidated acts of government there would be few that would survive.

The High Council's written recommendations to the Council of Ministers included the statement that Kabazi was opposed to the recommendations and that Kabazi's views as to whom the concessions should be awarded were different from that of the High Council (907a, 976a, 977a). It was Kabazi's recommendations that were submitted to the King in advance of the meeting of the Council of Ministers on February 20, 1966 and which were approved by the King in advance of the actual meeting (985a-987a).

l) Kabazi did not testify, as the defendant indicates (br. p. 25) that, practically speaking, no one would have had knowledge as to who was going to win the concessions at the time he wrote the letter to Galic on February 16, 1966. Kabazi made it clear that at the time he wrote the letter the King had already approved Kabazi's recommendations which were in conflict with the recommendations of the High Council and as everyone knew the King had the final decision (986-7). Kabazi testified that by his letter he wanted to have a record that plaintiff was interested with defendant in the enterprise (971a). The timing of the letter was such that in any event it could not have been expected to reach Galic in Paris before the time the awards were announced on February 20, 1966.

m) The defendant distorts the record (br. p. 26) when it claims that Kabazi testified that he typed the letter dated February 16, 1966 in Tripoli and that Kabazi admitted that he was continuously in Beida, from January to February 20, 1966. Kabazi testified that during this period he continuously attended meetings of the High Council and of the Council of Ministers, some of which were held in Tripoli and some of which were held in Beida (1024a). He was then asked this question and gave this answer (1025a):

> "Q. And you were continuously, then, during that period of January 1966 to February 20, 1966? A. Yes."

Palpably, the testimony was that he was attending these meetings between those dates wherever they were, and

he was not testifying that he was continuously at Beida between these two dates.

n) Defendant's contentions that Mr. Knight, an official of Olivetti, discounted the use of any Olivetti office typewriter (br. p. 28) or that Mrs. Tytell conceded that the letter was not typed on an Olivetti typewriter (br. pp. 27-8) are untrue. Kabazi had testified that the letter might have been typed on either an Olivetti typewriter or upon a Swedish typewriter and that he typed it either at his office or at his home (1026a, 1027a, 1028a, 1029a, 1030a). Mrs. Tytell testified flatly (1583-a) that the letter was typed on either an Olivetti of the kind which was in his office (1031a) or a Swedish typewriter of the kind which he had at home (1029a). Mr. Knight testified that the Olivetti typewriters in use during the period in question had the same characteristics as the machine which typed this letter (i.e., 2.54 millimeter horizontal spacing, and flat top figure 3's) (1600a-1601a).

CONCLUSION

The judgment and findings adverse to plaintiff should be reversed and judgment granted in favor of the plaintiff.

Respectfully submitted,

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Services of three (3) copies of
the within brief is
hereby admitted this 7th day
of May, 1975

Phillips, Iger, Benjamin, Krum & Ballon
Attorney for Defendant